SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term 1969

No. 510

FLORIDA CITRUS EXPOSITION, INC.,
also known as
FLORIDA CITRUS SHOWCASE, INC.,
Petitioner,

vs.

HUNGERFORD CONSTRUCTION COMPANY,
a Michigan corporation; and
CONTINENTAL CASUALTY COMPANY,
an Illinois corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FREE PRESS PUB. CO., INC. - TAMPA, FLORIDA

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 22, 1969.*

Citations To Opinions Below

The opinion below is unreported and is printed in the appendix hereto, infra, pages 16-24.

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* Note: All emphasis supplied.
"R" means certified Transcript of Appendix used in lower court.
"ST" means certified Supplemental Transcript which contains all testimony except exhibits.
"A" means Appendix hereto.
The Petitioner will be called "Owner" and Respondent "Contractor."

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 22, 1969 (A 23, infra). The jurisdiction of this Court is invoked under *28 U.S.C., Section 1254(1)*.

WHETHER—

THE DECISION OF THE LOWER COURT CONFLICTS WITH DECISIONS OF THIS COURT, OF CIRCUIT COURTS OF APPEALS, AND OF THE SUPREME COURT OF FLORIDA, BY HOLDING THAT A LIQUIDATED DAMAGES PROVISION FOR FAILURE TO COMPLETE A BUILDING WITHIN A FIXED TIME, THOUGH VALID WHEN THE CONTRACT WAS MADE, BECAME A PENALTY AFTER DELIVERY TO THE OWNER, WITHIN SUCH FIXED TIME, OF THE BUILDING IN A SUBSTANTIALLY INCOMPLETE CONDITION, ON THE GROUND THAT THERE WAS NO DELAY IN DELIVERY OF THE BUILDING AND THE OWNER DID NOT PROVE THAT THE ACTUAL DAMAGES ARISING FROM INABILITY TO USE THE FAULTY BUILDING FOR CERTAIN USES CONTEMPLATED BY THE PARTIES WERE PROPORTIONATE TO THE AMOUNT OF STIPULATED DAMAGES.

STATEMENT

Suit was filed in the United States District Court for the Middle District of Florida by Hungerford Construction Company (hereinafter called "Contractor") against Florida Citrus Exposition, Inc., also known as Florida Citrus Showcase, Inc. (hereinafter called "Owner") for the balance alleged to be due under a construc-

tion contract for an exhibition building at Winter Haven, Florida (R 6-9). Jurisdiction of the District Court was invoked on the ground of diversity of citizenship (R 6). The Owner filed a counterclaim against the Contractor and Continental Casualty Company, its surety, seeking recovery of damages sustained by reason of improper construction of the building and for liquidated damages for delay in completion of the building within 180 days, as required in the contract (R 9-13). The building was to be used by the citrus industry for a citrus festival during February and March of each year, for rental to third parties desiring the building for exhibition purposes and admission was to be charged the public year round to view exhibits located in such building (ST 405-408). The building was delivered to the Owner within the 180 day completion period but was in a substantially defective and incomplete state. The dome leaked after rains, the plaster became discolored and some fell to the floor. After attempted repair by the Contractor, the leaks continued with subsequent discoloration of plaster (A 19, infra). It was necessary for the Owner to repair the dome and other parts of the building at substantial cost. The evidence showed that the Owner had to abandon the admission charge to view exhibits in the building and lost opportunities to rent the building to third parties for their use (ST 467-469).

Under appropriate charges as to what constituted "completion of the contract" and "substantial performance" thereof, the jury awarded actual damages for corrective work by the Owner in the amount of $49,500, representing 27% of the entire contract price of $185,000, and awarded $28,250 as liquidated damages (ST 1016-1018), (R 16). Because of mathematical error,

the first form of verdict was revised. An examination of the revised verdict shows the changes written in by the jury (R 16, ST 1033-1046).

The contract provided that:

> "All work under this Contract shall be completed within 180 calendar days. . . .
>
> "The amount of $200.00 (sic) per calendar day will be assessed as the fixed, agreed liquidated damages to be deducted by the Owner from the sums due under other provisions for each and every calendar day of delay in completion of the work. . . ." (R 161-162) †

The jury verdict awarded the Contractor $27,973.60 for balance due on the contract and the Owner the sum of $77,750 as damages on the counterclaim, $49,500 of which was for actual corrective costs. $28,250 was for liquidated damages, representing 113 days at $250 per day (R 16; ST 1016-1018, 1033-1046).

The jury apparently selected 113 days delay time on the basis that the building was delivered around March 4, 1965, and the Contractor and Owner did not break off negotiations for the Contractor to complete the building until approximately June 25, 1965, at which time the Owner assumed responsibility for completing the building (ST 412-418, 650-655).

The Court of Appeals held that under Florida and general law the question whether the liquidated damage provision was applicable was a question of law for

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† The provision for $200 per day for delay is inaccurate and was inserted by error, although the lower court assumed that $200 a day was the correct figure. The figure should be $250 per day (ST 443-444). The amount is not relevant, legally speaking, but mathematically it shows the jury calculated 113 days of delay at $250 a day to get the figure of $28,250 for liquidated damages.

the Court. It held, however, that since the building had been turned over to the Owner within the time period for construction, regardless of its defective and incomplete condition, there was no breach of performance on time. It held that it was error for the District Court to submit the liquidated damage provision of the contract to the jury as a basis for damages.

It further held that since the Owner was able to make use of the building in its incomplete condition, for the citrus festival which it called the "primary use" of the building, there was a question as to whether there could be liquidated damages assessed for loss of what it called "secondary uses" of the building, i.e., for rental to third parties and for charging admission to the public for viewing exhibits in such building.

It held that such loss of "secondary uses" could be proved with certainty and that the Owner must show that the amount so proved was not disproportionate to the liquidated damages of $250 a day provided for delay in completion or else only the actual damages so proved could be recovered.

The Court ordered a new trial on the question of the actual damages sustained by failure to complete, and ruled that the liquidated damage provision of the contract could not be used or considered as a basis for damages. The judgment was affirmed as to the claim of the Contractor (A 22, infra).

REASONS FOR GRANTING THE WRIT

1. Clearly, the question presented is of importance to the construction industry which plays such a significant role in our private economy and in the functioning of our government—federal, state and local.

If the decision is permitted to stand as the controlling law of the Fifth Circuit Court of Appeals with respect to liquidated damage provisions, highly important government construction contracts (which almost always contain such provisions) in the areas of national defense and outer space development will be affected in the states within the jurisdiction of the Fifth Circuit. This Court will take judicial notice that contracts for the development of facilities and equipment for such national purposes are frequently made in the States of Texas, Florida, and other states which are located within such Circuit's jurisdiction. Obviously, as this Court has emphasized, damages for breach in performing this and similar kinds of contracts are impossible of ascertainment. *United States v. Bethlehem Steel Co.,* (1906) 205 U.S. 105, 27 S.Ct. 450, 51 Ed. 731.

It also appears that the decision of the lower court is in conflict with rules and principles relating to liquidated damages as declared by this Court, by at least two Circuit Courts of Appeals and by the Supreme Court of Florida. Moreover, in its opinion the lower court misinterpreted and misapplied the very Florida decision on which it purported to rely. These conflicts will now be examined.

2. The landmark decision of this Court on liquidated damages is *Sun Printing and Publishing Assoc. v. Moore,* (1902) 183 U.S. 642, 22 S.Ct. 240, 46 L. Ed 366.

In upholding liquidated damages for failure of defendant to return a Yacht, even though its value was less at trial than the stipulated damages, this Court recognized the difference between stipulated damages for breach of a single (one) covenant of a contract as contrasted with stipulated damages for the breach of several covenants of varying degrees of importance. (46 L.Ed. 379). In the latter case, the stipulated damages may well be held to be a penalty, although valid in the former case.

This very distinction is what the lower court overlooked. The covenant of the construction contractor was full completion of the building within the time specified. The uses to which the building was to be put (whether primary or secondary use) were irrelevant. The lower court refused to recognize that the basic covenant and object of the liquidated damage provision was *completion of the building* for all and any uses to be made of it.

It erroneously held that, though the building was 27% incomplete at the end of the time period for construction, it was used by the owner (in its leaking and damaged condition) for a citrus festival and hence the liquidated damage provision could not be invoked.

It then held that the other uses of the building, rental to third persons and admission charges to the public to view exhibits in the building the year round, were secondary and, therefore, the damages flowing from such loss of use would have to be proved with certainty and shown to be proportionate to the amount of liquidated damages, or else just actual damages for such loss of use could be recovered.

These holdings were not only contrary to the law prescribed by this Court in *Sun Printing & Publishing*, supra, but also to *United States v. Bethlehem Steel Co.*,

(1906) 205 U.S. 105, 27 S.Ct. 450, 51 L.Ed. 731 (contract for making gun carriages where liquidated damages allowed even though little if any actual damages ensued from failure to deliver on time); *Wise v. United States,* (1919) 249 U.S. 361, 39 S.Ct. 303, 63 L.Ed. 647 (upholding liquidated damages of $200 per day for delay in completing two buildings on time when one building was completed and one not completed as scheduled); *Priebe & Sons, Inc. v. United States,* (1947) 332 U.S. 407, 68 S. Ct. 123, 92 L. Ed. 32 (holding that even though damages suffered are less than the damages contracted for this is not fatal to the validity of liquidated damages).

There is no way to reconcile the holdings of the lower court with the rules and principles regarding liquidated damages clearly laid down by the above decisions of this Court.

3. The Third Circuit Court of Appeals in *United States v. LeRoy Dyal Co.,* (1950) 186 F.2d 460, squarely held that neither actual damages nor proof of actual damages was required to sustain a liquidated damages provision.

A similar holding was made by the Eighth Circuit Court of Appeals in *Southwest Engineering Co. v. United States,* (1965) 341 F.2d 998. This case involved a contract to construct four radio facilities. The Court stated:

> ". . . the majority view is that proof of actual damages is not required to sustain an action for liquidated damages, unless the contract so provides . . ." (341 F.2d 1003)

The decision of the lower court is in obvious conflict with both of the above decisions.

It is also interesting to note that in *Southwest*, supra, the court called attention to the Fifth Circuit Court of Appeals' decision in *Massman Construction Co. v. City Council of Greenville*, (1945) 147 F.2d 925, and noted critically that the *Massman* decision which used the "hindsight test" to determine the validity of liquidated damages and required proof of actual damages to sustain such a provision, was the minority view.

4. The lower court held that the District Court erred in permitting the jury to consider liquidated damages.

The fundamental vice in the analysis of the lower court was its failure to recognize that provision for liquidated damages to cover delay in the completion of the building has nothing to do with how many uses are to be made of the building in a complete state. Surely, if the contractor fails to follow the owner's plans and specifications for a building and tenders a structure that is not substantially complete, there has been a breach of the covenant to deliver on time. The lower court, however, looks solely to the uses that could be made of the building, although it was found by the jury to be substantially incomplete. It then ranked as primary and secondary the uses that could be made of the building in such incomplete state and held that since the uses were of varying importance, the liquidated damages provision was really a penalty and unenforceable. It erroneously selected, because of this faulty analysis, as an analogy a Florida realty sales contract case in which a liquidated damages provision was equally applicable by the very terms of the contract to the breach of any one of several minor undertakings. The analogy was wholly misplaced.

It cited and purported to rely on one Florida decision for its ruling — *Pembroke v. Caudill,* (1948) 37 So. 2d 538, 6 ALR 2d 1395. In *Pembroke* the contract was for the sale of realty which the Florida Supreme Court said in that very opinion could not sustain a liquidated damages provision in any event because the damages to seller from a failure to purchase were not uncertain, conjectural, or speculative. Instead, it said damages were ascertainable and could be only "the profits to be realized from the sale" by the seller. (37 So. 2d 541). It cited *Smith v. Newell,* (1896) 37 Fla. 147, 20 So. 249. *Woods-Hoskins Young Co. v. Dittmarr,* (1931) 102 Fla. 1000, 136 So. 710, for this rule.

After holding this in *Pembroke,* the Florida court pointed out that the liquidated damages were not for complete failure of the buyer to accept the realty and perform the contract, but were to be paid in the event any one of a number of things were not done, including the execution of all necessary papers "within five days from the delivery or tender of abstract or title insurance commitment," or even one day's delinquency in paying the balance of the purchase money (37 So. 2d 542).

At the same time the Florida court cited a construction contract case, *Southern Menhaden Co. v. How,* (1916) 71 Fla. 128, 70 So. 1000, in which it was held that liquidated damages would be sustained because of the difficulty of ascertaining damages in such case. Although the *Menhaden* case was urged upon the lower court as the controlling Florida decision apposite to the construction contract before it, no mention was made of the *Menhaden* rule by the lower court nor was any consideration given to the decision so far as can be ascertained.

Thus, the lower court in purporting to look to Florida law selected a case involving the sale of real estate in which, to begin with, damages are deemed to be capable of ascertainment so as to exclude the propriety of liquidated damages for failure of the buyer to accept and pay the contract price. Moreover, in *Pembroke* which it erroneously selected as the applicable law, the contract provided that the same amount of liquidated damages would be paid if the buyer defaulted in any one of a number of minor particulars, including failure for one day to meet a payment on the balance due.

It is apparent that the lower court missed the real purpose and object of the provision for liquidated damages in the instant case. The provision was to be invoked for one breach, and one breach only, namely, failure by the contractor to deliver a *completed building* on schedule. It is equally true that this breach occurred, and the jury so found, when an incomplete and damaged building was delivered to the owner. The contract mentioned no occurrence, other than failure to deliver a completed building on time, as the basis for liquidated damages. The ability or inability of the owner to use the building for one purpose or many purposes should have no relation to the validity of the liquidated damages provision. The question should have been whether at the time of making the construction contract was it likely that damages for failure to complete the building on time would be difficult, if not impossible, of ascertainment. In construction contracts the Florida Supreme Court, as shown by the *Menhaden* decision, supra, upholds liquidated damage provisions because of the un-

certainty of damages in event of failure to complete construction on time. The decisions of this Court and of the Third and Eighth Circuit Courts of Appeals declare the same law, as has been shown hereinbefore, and there is no basis for saying that Florida law is different from the general law.

The conflicts created by the decision of the lower court are clear and need to be resolved by correcting the erroneous decision of the lower court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, J. A. McCLAIN, JR., one of the attorneys for FLORIDA CITRUS EXPOSITION, INC., also known as FLORIDA CITRUS SHOWCASE, INC., Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of August, 1969, I served a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Apepals for the Fifth Circuit, together with the Appendix, on the Respondents by mailing a copy in a duly addressed envelope, postage prepaid, to their respective attorneys of record, as follows: Anthony S. Battaglia, Esq., of Parker, Battaglia & Ross, Post Office Box 12078, St. Petersburg, Florida 33733, and to Raymond J. Malloy, Esq., 424 South MacDill Avenue, Tampa, Florida 33609.

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